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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

)	Docket OST-97-2881 -388
Computer Reservations System (CRS) Regulations)	Docket OST-97-3014 -142
)	Docket OST-98-4775 -191

COMMENTS OF US AIRWAYS, INC.

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I. SUMMARY OF COMMENTS

- The Computer Reservation System ("CRS") regulations must not be implemented as currently proposed, otherwise, it would have grave consequences for US Airways, similarly situated carriers, and consumers.

- The prohibitions on display bias and limits on screen padding must be expanded.

  - Continuing the prohibitions on display bias is fully warranted and they should apply more broadly than the Department proposes.

  - The Department's explanation of its tentative determination not to extend the display bias prohibitions to on-line travel agencies ("OTAs") is superficial, less than compelling, and – in several respects – fundamentally flawed.

  - A notice about display bias is no longer an option.

  - With increased code-sharing, the Department must prevent "screen padding" and limit the total number of code-share options that can be displayed for a particular flight.

- The Department should not restrict the amount of detailed marketing/booking data airlines can purchase as it would impose further marketing costs on the airline industry.

- The Department should not eliminate the mandatory participation requirement nor the prohibition on discriminatory booking fees as it would have grave anti-competitive consequences for the non-larger carriers and all consumers.

  - The Department has not provided compelling reasons for eliminating the mandatory participation rule and the prohibition on discriminatory booking fees. To the contrary, the Department's own findings and experience demonstrate the continuing need for these rules.

  - The mandatory participation rule should apply to carriers that market particular CRSs as well.

  - The proposed sale of carrier-interests in Worldspan does not change the need for a mandatory participation rule.

  - Airlines should not be permitted to own CRSs or OTAs other than each carrier's own website.

- The Department should retain a sunset provision for the CRS regulations as the CRS industry continues to change rapidly.

II. THE CRS REGULATIONS, IF IMPLEMENTED AS PROPOSED, WOULD HAVE GRAVE CONSEQUENCES FOR US AIRWAYS, SIMILARLY SITUATED CARRIERS, AND CONSUMERS.

US Airways strongly supports the Department's decision to maintain the CRS regulations. These regulations have provided substantial public benefits over the years to carriers and consumers and the evidence and experience in this rulemaking make clear that CRSs warrant continuing regulation.

That said, the CRS regulations – if adopted as currently proposed – would have grave consequences for US Airways, similarly situated carriers, and consumers. The proposals suffer from two fundamental flaws – *first*, there are unfounded, anti-consumer modifications to the existing rules, and *second*, there is inaction on other critical issues, which if left unaddressed, will have serious anti-competitive and anti-consumer ramifications as well. In both cases, the proposed regulations have the unintended consequences of favoring the larger, more powerful global carriers and OTAs to the substantial detriment of consumers in general, US Airways' passengers in particular, many carriers like US Airways, and other distribution channels. The Department must not implement regulations that would yield such a dire result.

As the airline industry continues to suffer in the post-September 11th environment with greatly reduced passenger traffic and revenues, the Department should seek to level the playing field for all stakeholders such that competition is fair and consumers/travel agents are provided with comprehensive and unbiased information to fairly evaluate fare and service options. As explained below, the proposed CRS regulations, in several critical are as, fail in these fundamental respects, and this failure will have grave consequences for US Airways, similarly situated carriers, and most importantly, consumers.

III. PROHIBITIONS ON DISPLAY BIAS AND LIMITS ON SCREEN PADDING MUST BE EXPANDED.

US Airways fully supports the Department's proposal to retain the display bias prohibition as it remains an ongoing concern of many carriers, consumers, and travel agents. However, the concern about display bias is *even greater today* than in the past, as technology in recent years has provided consumers with increasing levels of direct access to researching, booking, and purchasing air transportation through self-help websites and public access CRSs. The Department's tentative decision to allow OTAs to engage in display bias fails to appreciate the changing dynamics of the various distribution channels and this heightened level of concern. The Department should therefore reconsider its tentative decision and promulgate a display bias prohibition with broader applicability so that on-line consumers will enjoy the benefits of the display-bias prohibitions as others currently do.

A. Continuing The Prohibitions On Display Bias Is Fully Warranted, As The Department Has Acknowledged.

Display bias refers to the use of carrier identity in selecting flights from the database and ordering the listing of flights in the display. 67 Fed. Reg. at 69395. The Department previously made some critical determinations on this issue: (i) display bias misleads travel agents and their customers; and (ii) display bias prevents carriers lacking preferential treatment from being able to compete on price and service quality by shifting significant amounts of revenue to the airline benefiting from the bias. *Id.* Both of these determinations remain valid today. In other words, without the display bias prohibition, CRSs would likely bias their displays in favor of certain carriers, specifically: (i) carriers who are owners of that particular CRS, (ii) carriers who purchase advertising/promotional items from the CRS, and (iii) carriers who pay a premium for

preferential display treatment. For these compelling reasons, US Airways supports the Department's decision to continue the prohibition on display bias.

B. The Prohibitions On Display Bias Should Apply More Broadly Than The Department Proposes.

On the most basic level, display bias involves listing flights for a particular city-pair based on carrier identity, rather than other considerations such as fares or elapsed times. By definition, display bias is not limited just to CRSs; it can – and does – arise in OTAs. Accordingly, there is no logical reason to apply the display bias prohibition to CRSs, but not to OTAs (as the Department is proposing). In fact, since those OTAs are often utilized directly by consumers for researching and consummating air travel ticket purchases, there is an even more compelling reason to prevent display bias in public-access OTAs than in CRSs that are most often utilized by professional travel agents. Accordingly, this prohibition should be applied more broadly, such that OTAs like Orbitz, Expedia, Travelocity, and others are prohibited from biasing their displays – just as the CRSs are.[1] Specifically, the Department needs to expand the definition of "system" in the CRS rules to include such OTAs for purposes of the regulation prohibiting display bias.

US Airways believes that there should only be two exceptions to an expanded display bias prohibition. *First*, it should not apply to individual airline websites because it is self-evident, even to the consumer, that travel information on an airline's own website will be biased in favor of that particular carrier. *Second*, consumers should have the option of using a biased display if, but only if, they choose to do so. However, even in those cases, the display bias prohibition should apply to OTAs in the first instance. That is, the first screen listing of flight

options should be unbiased, with an option (at the end of the initial listing) for the consumer to expressly choose to bias the display. Except for these two limited carve-outs, the Department should modify the CRS regulations to prohibit display bias in OTAs.

C. The Department's Explanation Of Its Tentative Determination Not To Extend The Display Bias Prohibitions To OTAs Is Superficial, Less Than Compelling, And – In Several Respects – Fundamentally Flawed.

In tentatively declining to extend the display bias prohibitions to OTAs, the Department takes comfort from its belief that OTAs "desire" to satisfy customers and the periodic surveys of OTAs by newspapers/magazines. 67 Fed. Reg. at 69411. These beliefs presuppose that: (i) the vast majority of consumers compare ticket prices, pre- and post-purchase, with those that might be obtained through other OTAs or travel agents; (ii) consumers throughout the nation are privy to, take notice of, and fully digest newspaper/magazine surveys of OTAs; and (iii) such surveys are scientifically based or otherwise warrant a consumer's reliance. Each of these suppositions is dubious at best and, in any event, fundamentally flawed. Contrary to the Department's views, purported customer satisfaction and periodic newspaper/magazine surveys of OTAs will *not* discipline OTAs with respect to display bias, *nor* will they safeguard the interests of consumers utilizing these distribution channels.

Notably, the Department relies on evidence provided by Orbitz for its tentative decision not to expand the applicability of the display bias prohibition to OTAs. For example, the Department identifies one study cited by Orbitz purporting to show that many consumers visit multiple internet sites in purchasing airline tickets (60% of leisure consumers visit two sites before purchasing; almost 45% visit 4 or more sites before purchasing). *Id.*

[1] Indeed, it would be unreasonable for the Department to assume that Orbitz will continue to provide neutral displays in the future without the requested expansion, once the current scrutiny of Orbitz by the Department and Department of Justice dissipates.

First, even accepting this survey at face value, nearly 40% of *leisure* consumers do *not* research two or more sites prior to purchasing tickets. So, how would these and other non-leisure consumers learn of better fares and better service options or become aware of display bias? More importantly, even if consumers visit 4 or more sites, such multiple visits do not ensure that they would then receive accurate and complete travel information as the Department nevertheless presumes. *Second*, the survey does not consider that consumers may visit multiple sites for reasons other than display bias. The Department incorrectly assumes that all 60% of leisure consumers visit several sites because they are fully aware of such bias. It is likely that the average consumer would be shocked and outraged to learn that certain websites provide incomplete and biased flight information. *Third*, even for those consumers who visit two sites before a purchase decision, a random sample of two OTA sites – without any display bias prohibition – will be insufficient for such consumers to distill the bias and fare offering differences in any meaningful way. *Fourth*, the single study referenced by Orbitz upon which the Department relies for its decision after a five-year rulemaking process does not, in any event, warrant the reliance the Department appears to be placing on it.

As further justification for its position, the Department opines that a consumer's lack of experience does not require a display bias prohibition on public-access OTAs because consumers will likely take more time to research various service and fare options than would "time pressure[d]" professional travel agents. *Id.* Incredibly, the Department has concluded that consumers need *less* protection from display bias than professional travel agents and experienced travel service providers. The flaws in this conclusion are self-evident, troubling, and inconsistent with Department precedent and guidance.

As a preliminary matter, now that the prevalent compensation system for travel agents has switched from commissions to services fees, the Department's opinion here is particularly weak. With a set service fee, travel agents have less incentive to offer the lowest fares available and have less time pressure currently than they did in the commission-based regime.

More importantly, the Department's "logic" is utterly inconsistent with, and indefensible given, its longstanding view in many other areas that consumers – more than travel agents and airline reservation agents – need more details, more clarity, more explanations, and more protection from certain marketing and informational practices. The Department has promulgated and strictly enforced extensive regulations on schedule listings and on advertising fares, related taxes/fees, and service offerings, the driving force of which is clarity and disclosure for the benefit of the consumer.

For example, in its March 1996 Guidance Letter, the Department emphasized that its CRS display marketing rules and related guidance focused on "public access CRS displays and not those viewed by airline reservationists and travel agents," noting that "*travel agents [and] airline reservationists . . . understand the mechanics of fare displays . . . [b]ut the inexperienced user may well be misled.*" March 18, 1996 Letter from S. Podberesky to U.S. and Foreign Airline and Travel Industry Chief Executives at 2-3 (emphasis added). That same Guidance Letter also discussed rules governing air transportation promotion on "Internet Displays." *Id.* at 3-4. In fact, the Department has imposed civil penalties on several OTAs for purported violations of Section 41712 and/or 14 C.F.R. § 399.84, for improperly promoting air transportation services and fares in ways that could mislead consumers. *See, e.g.*, DOT Orders 02-3-28 (consent order of travelocity.com); 01-9-3 (consent order of Lowestfare.com). And, recently, for example, in permitting Orbitz to list its service fees separately from the fare itself,

the Department imposed certain conditions on this exemption "to prevent deception to consumers." DOT Order 02-3-12, at 1. The Department also noted in its commentary on the current rulemaking that, absent regulations, certain practices "would cause *consumers* and their travel agents to receive biased or inaccurate information on airlines services." 67 Fed. Reg. at 69385 (emphasis added).

The Department's commentary on this subject in the NPRM turns this precedent and consumer-protection logic on its head. Simply put, the Department's purported justification for not protecting consumers using OTAs (as it does elsewhere) does not even pass superficial scrutiny. Competition, fairness, and the Department's history of consumer protection dictate that expanding the display bias prohibition beyond CRSs to OTAs is fully warranted.

D. A Notice About Display Bias Is No Longer An Option.

In its 1998 Comments, US Airways suggested that the Department should give CRSs the option of complying with the display bias regulations by providing a written notice to the user that the CRS did not comply with such regulations. The Department discussed a similar alternative in its most recent comments. 67 Fed. Reg. at 69412. In the intervening years while the CRS rulemaking has been pending, it has become clear to US Airways that providing written notice of non-compliance with the display bias prohibition would be inadequate to CRSs and now additionally to OTAs as well. As a preliminary matter, a general notice about non-compliance would be insufficient to alert the consumer-user as to what the real limitations of the display results would be.[2] At the other end of the spectrum, a listing of each and every carrier whose fares *are not* in a particular CRS/OTA or details about how each display is generated (*i.e.*,

[2] *I.e.*, "[T]his CRS does not comply with the CRS display bias regulations of the U.S. Department of Transportation". The average consumer, unfamiliar with the U.S. Department of Transportation regulations, will not understand what this disclaimer, in fact, means.

the selection criteria) would not readily reveal to the average consumer or even professional travel agent what carriers or service/fare options *would be* displayed but in an unfavorable position. Rather, any information provided in such a notice would be incomplete or, if somehow complete and accurate, would be so complicated and lengthy that its impact on consumers would be minimal. For these reasons, any notice or disclaimer about non-compliance with the display bias prohibition would be inadequate and therefore, would not be a viable alternative to the display bias prohibition.

E. With Increased Code-Sharing, The Department Must Prevent "Screen Padding" And Limit The Total Number Of Code-Share Options That Can Be Displayed For A Particular Flight.

Since this rulemaking began several years ago, code-sharing has expanded substantially – both on domestic and international services, and both on U.S. and foreign carriers. Similarly, the number of marketing and/or antitrust immunized alliances has increased dramatically. These developments were so extensive that, in 1999, the Department promulgated an entirely new regulatory part – 14 CFR Part 257 – to govern oral/written notification and advertising of code-sharing services.

These developments require that some limits be placed on code-sharing displays. Otherwise, screen padding will overwhelm consumers and travel agents and effectively block other carriers from competitively listing their service offerings.

In the present rulemaking, the Department proposes that "[i]f a connecting service is sold under the codes of two or more carriers, each system shall ensure that the service is displayed *only once under the code of each carrier*." 67 Fed. Reg. at 69426 (emphasis added). US Airways fully supports the prevention of screen padding as it further protects consumers from display bias, however, it believes that this proposal does not go far enough. As the number

of carriers code-sharing on a particular flight or flights has increased, particularly with the development of broad global alliances, the potential for screen padding to the detriment of consumers, travel agents, and other carriers has increased dramatically. The Department's proposal does not account for, nor does it address, this fundamental reality.

In its comments, the Department explains that a connecting Northwest-KLM service could possibly be displayed four times given the number of code-sharing combinations (*i.e.*, NW-KLM; NW-NW*; KLM*-KLM; KLM*-NW*). To preclude this, the Department is proposing a limitation which would effectively limit the two carriers to two display items – one for NW and one for KLM ("*only once under the code of each carrier*"). Practically speaking, however, the Department's concern about listing a particular flight four times would still remain – even under the Department's proposal, because code-sharing and alliances have expanded so much. That is, a particular flight routing operated by a single carrier but carrying the code of three alliance partners, would effectively result in four separate display lines on the CRS, representing a single flight routing albeit under four different codes. This threat exists in displays of domestic and international services, and the Department's proposal fails to appreciate this threat.

The rapid growth and expansion of code-sharing and alliances make it incumbent on the Department to ensure that multiple listings of one particular flight routing under different codes do not overwhelm the display for agents and consumers. Limitations on the number of times a particular flight routing could be listed, *regardless* of the number of code-sharing carriers on the flight, are also necessary to ensure that carriers in smaller alliances or code-sharing relationships are not effectively precluded from being displayed through screen padding by an excessive number of carriers marketing the SAME flight option – albeit under their different codes (as

limited by DOT's proposal). In this regard, the Transportation Research Board concluded that the Department should consider "developing rules that limit the kinds of code-shared flights that qualify for CRS listings and do not confer unfair competitive advantages." TRB Special Report No. 255, *Entry and Competition in the U.S. Airline Industry: Issues and Opportunities*, at E-12 (1999).

For example, if Delta, Northwest, and Continental are able to proceed with their planned alliance, they could list a particular flight three times under the Department's proposal (i.e., NW-NW*; DL*-DL; CO*-CO*) – four times if Alaska Airlines (a NW and CO code-share partner) likewise placed its code on the flights.

This situation would be exacerbated for international services. If Delta, Northwest, and Continental can proceed with code-sharing on international services and incorporate their foreign partners as well (*e.g.*, KLM, Air France, and Alitalia), a single international flight routing (*e.g.*, IAD-AMS; IAD-AMS-MXP) could be listed at least six times under the Department's proposed rule.[3] Such padding clearly does not benefit consumers, travel agents, or competition. It unfairly benefits the largest global network and domestic alliance carriers. Accordingly, the Department needs to take its proposed regulation in this regard a step further – to limit the number of times a particular flight can be displayed in a particular listing.

[3] Exhibit 1 provides a current example on Sabre for available flight service from SEA to LAX for March 25, 2003. Because of the numerous codeshare displays, only 6 flight routings are displayed in the first four screen pages. Each screen page lists 6 display lines. Therefore, of the 24 possible display lines available in the first four screen pages, 18 display lines are utilized to display the same 6 flights in different codes. In other words, 75% of the screen space for the first four pages have been "padded" by codeshare displays. It should also be noted that the very first flight listed is a nonstop flight (no. 288) which departs at 7:00am. Because of the numerous codeshare displays, a comparable nonstop UA flight (no. 771) which departs at 7:10am is not listed in the display until 10 displays later. In addition, a comparable nonstop WN flight (no. 712) which departs at 6:55am is not listed in the display until screen page 9 or 53 displays later. Finally, due to the "padding," a comparable one stop services provided by competing non-alliance carriers are not displayed until screen page 12.

US Airways therefore supports the Department's proposal to limit the number of times a particular carrier's code can be displayed for a particular flight, *AND US Airways further proposes* that the total number of codes that can be displayed for a particular code-share flight be limited as well.

> More specifically, *regardless of whether the particular flight routing at issue is a nonstop, direct, or connecting service*:
>
> *For domestic services*, a particular flight routing can be displayed only once under the code of each carrier *with a maximum of two (2) codes displayed.*
>
> *For international services*, a particular flight routing can be displayed only once under the code of each carrier *with a maximum of three (3) codes displayed.*[4]

Only with this additional limitation can the Department be confident that consumers, travel agents, other airlines, smaller alliances, and competition in general will not be overwhelmed – and disadvantaged – by screen padding.

IV. THE DEPARTMENT SHOULD NOT RESTRICT THE AMOUNT OF DETAILED MARKETING/BOOKING DATA AIRLINES CAN PURCHASE.

The Department is also considering several variations to the rule on marketing/booking data availability, seeking to restrict the amount and type of detailed data that an airline can purchase. As proposed, the modified rule would preclude CRSs from selling, and carriers from obtaining, data on the bookings made by individual subscribers and data on airlines that have not consented to the release of its data. 67 Fed. Reg. at 69402-04. US Airways opposes this change

[4] The maximum limit proposed by US Airways is different for domestic code-share and international code-share services for a critical reason. The international limit recognizes that at least one foreign carrier is often involved in any particular foreign code-share. Accordingly, it is appropriate to take the domestic limit US Airways proposes of two codes and add one code (to account for the possibility of a foreign code-share partner).

to the regulation governing the availability and sale of marketing/booking data as it would impose upon carriers, and ultimately consumers, further and unnecessary market research costs.

The data which the Department seeks to preclude from distribution provide extremely important information for all airlines – not just major global carriers, mid-sized national carriers, or low-cost carriers. MIDT in its present comprehensive form directly benefits the consumer through lower costs in airline pricing, scheduling, and revenue management. MIDT allows airlines to make highly effective and efficient decisions in these essential business processes of airline management.

For example, MIDT data permit an airline to properly evaluate market size and potential and to recognize as well as project developing demand trends. This reduces risk and uncertainty (and hence cost) when determining whether to operate a given route, which type of equipment (capacity) to deploy, and which schedules will best satisfy the customer's needs. (frequency, timing). In addition, the comprehensive and forward looking aspects of MIDT data are used to help establish a baseline market demand and to forecast future demand at various price levels. Finally, MIDT data are the most effective tool for identifying specific distribution outlets that can make an airline's product offering available to the consumer most likely to benefit from it. For instance, once a new service is scheduled, MIDT will help airline's sales-force identify, in the most cost effective manner, those agencies that can benefit most from having capacity and optimum pricing made available to their customers, the flying public.

In this respect, MIDT data are unparalleled in terms of their comprehensiveness and timeliness. As such, it is the most effective method of providing the necessary market input to support the route strategy decisions. Without MIDT in its current form, airlines will be forced to re-create this information on an individual basis. Individual airline research would be greatly

cumbersome, costly and less precise, all of which would be reflected in the service and price offering to the consumer. The proposed changes to MIDT contained in the NPRM will destroy the availability of the most complete and accurate market information available, and these negative effects will felt by the consumer in the form of higher prices and schedules that do not optimally meet the traveler's needs.

If the Department is concerned with the misuse of MIDT by certain carriers, that should be addressed individually by the Department with its specific enforcement authority. The proposed regulations to MIDT are not the appropriate vehicle for addressing the stated concerns. MIDT is not anti-competitive; it is improper behavior by certain carriers that distorts competition. The Department maintains sufficient alternative recourses for addressing anti-competitive behavior without having to damage an industry tool that provides so many clear benefits to the consumer.

Although low-cost carriers in this proceeding have generally advocated eliminating, or greatly restricting, the availability of such data, it is noteworthy that America West, a low-cost carrier, urged the Department to maintain the current rule governing such data. 67 Fed. Reg. at 69402. In addition, in the European Union proceedings, smaller and new entrant carriers have urged that the EU maintain the availability of this data because it helps them to evaluate new markets and strategize how to enter such new markets.

The proposed rule on MIDT data represents a substantial change from the current regulation. The Department has not shown any compelling evidence and reasoned analysis to support the proposed drastic change. If the Department is truly concerned about the "indications" that some carriers may have used the data to interfere with the ability of travel agents to book the best services meeting their clients' needs, 67 Fed. Reg. at 69402, it should

issue guidelines outlining inappropriate uses of such data and enforce such guidelines – it should not, however, gut the data which, as the Department has recognized, has substantial, important, and legitimate pro-consumer uses.

V. THE DEPARTMENT SHOULD NEITHER ELIMINATE THE MANDATORY PARTICIPATION REQUIREMENT NOR THE PROHIBITION ON DISCRIMINATORY BOOKING FEES.

With virtually no evidence to support its position, the Department has proposed eliminating the mandatory participation rule and the prohibition on discriminatory booking fees, as advocated by the "larger airlines" (namely, Delta, American, United, and KLM), Orbitz, and Worldspan (which has announced it is being sold by American, Delta, and Northwest). 67 Fed. Reg. at 69393. In so doing, the Department fails to appreciate the critical role that the mandatory participation rule and the prohibition on discriminatory booking fees rule play in (i) ensuring access for consumers to fare and service information from carrier-owners and carrier-marketers – regardless of the system used, (ii) leveling the playing field for all carriers regardless of their relationships with the CRSs, and (iii) preventing future abuse by large carriers and CRSs. It remains and will remain vitally important that the Department maintain these two rules, and it should further extend the mandatory participation rule to carriers that substantially market systems.

A. The Department Has Not Provided Compelling Reasons For Eliminating The Mandatory Participation Rule And The Prohibition On Discriminatory Booking Fees. To The Contrary, The Department's Own Findings And Experience Demonstrate The Continuing Need For These Rules.

The Department proposes eliminating the mandatory participation rule and the prohibition of discriminatory booking fees based principally on hypothetical conjecture about the

potential results of such a drastic change: "We [DOT] believe that ending the requirement *may be* beneficial"; "the mandatory participation rule [and the prohibition against discriminatory booking fees] *may* unduly limit [each airline's] ability to bargain"; "ending the requirement[s] *could* enable market forces to discipline the systems' terms for airline participation." 67 Fed. Reg. at 69393-94 (emphasis added). Not surprisingly, only the larger carriers and their aligned CRS (Worldspan) and OTA (Orbitz) have advocated for eliminating these two rules.[5] It is surprising, however, that the Department is willing to accept the large carriers' self-serving request based on the conjecture that "some airlines like United" might obtain "some flexibility in negotiating for better terms from the systems." 67 Fed. Reg. at 69399. The Department appears to have either: (i) failed to consider the devastating consequences that this would have on the remaining carriers, (ii) simply ignored such consequences, or (iii) based its proposal on the illusion that somehow all carriers would be able to negotiate with the CRSs.

The conjecture advanced by the large carriers is not a sufficient – let alone compelling – basis for the sea-change contemplated by the Department, particularly given the Department's evidence and experience to the contrary.

> We [DOT] adopted the current rule *due to our experience* that airlines owning or marketing a system *have at times limited their participation* in competing systems (or denied complete fare and schedule information to competing systems) in order to compel travel agencies in areas dominated by such airlines to choose systems affiliated with those airlines. 67 Fed. Reg. at 69393 (emphasis added).
>
> The rule was also consistent with our *decisions finding* that a foreign *airline had engaged in unfair discriminatory conduct* by refusing to participate fully in a U.S. system that was competing with a system owned or marketed by the foreign airline. 67 Fed. Reg. at 69393 (emphasis added).

[5] "United and KLM urged us to terminate the rule barring discriminatory fees. American, Worldspan, and Orbitz argued to OMB that the discriminatory fees should be ended." 67 Fed. Reg. at 69399 (citation omitted).

> Given our *past findings* on the systems' *market power*, we ask the parties to comment . . . . We *recognize* that airlines affiliated with a system *have at times limited their participation* in competing systems in an effort to prejudice their ability to compete for travel agency subscribers. 67 Fed. Reg. at 69394 (emphasis added).

The Department should not set aside these findings and experiences upon which the original rules were based without any substantial evidence showing that they are no longer valid. Indeed, the Department's proposal cannot pass legal muster for it lacks any reasoned analysis supported by the record. As the D.C. Circuit explained, "[a]n agency which chooses to reverse a previously held position must, however, supply a 'reasoned analysis' of its decision. . . . Such an analysis should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected." *Ctr. for Science in the Public Interest v. Dep't. of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) ("*CSPI*") (citation omitted).[6] The burden to justify a change from the status quo is clearly on the Department seeking to revoke the existing regulation (here, DOT), *see id.*, and the Department has failed to justify with sufficient, let alone compelling, record evidence its proposed elimination of the mandatory participation rule.

The lack of evidence to support the Department's proposed drastic change is not surprising. After all, the reality is that the Department's past findings and experience upon which it promulgated the rule are as valid today as they have been in the past.

Even if the Department nonetheless continues to focus on its conjecture about the "potential" benefits of eliminating the rules, it must also consider the detrimental consequences

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[6] *See also Sierra Club v. Clark*, 755 F.2d 608, 619 (8th Cir. 1985) ("The rescission or modification of rules is subject to this standard, and an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." (internal quotation, citation omitted)).

that would result. In this regard, the Department's commentary fails to appreciate that eliminating the mandatory participation rule and the prohibition against discriminatory booking fees would have grave ramifications for many carriers, consumers, and travel agents. The Department's assumption that carriers normally try to make their services available through all significant distribution channels is misplaced – particularly in the current airline environment. 67 Fed. Reg. at 69394. This is a dubious proposition, particularly with regard to much larger and/or stronger carriers (*e.g.*, Southwest, Delta). Without the rule, carriers with such sizeable market shares and/or who market particular CRSs would likely refrain from participating in other systems, thereby attempting to move travel agent-subscribers to the CRS in which the carrier has such a marketing interest or otherwise favors.

For example, with the leeway that the Department is proposing to give these carriers, Delta and similar stronger, larger carriers have every incentive to, and indeed would very well, consolidate its CRS offerings in a single CRS – the CRS where it has a substantial interest (marketing or otherwise) or favorable deals. When confronted with that situation, a travel agent using another CRS (no longer with access to Delta's offerings) may very well be compelled to switch to Delta's favored CRS in order to access Delta fares readily for his/her clients. With enough agents being forced to switch to this particular CRS, carriers like Delta will have a free pass to exercise monopoly power to the detriment of consumers, and other carriers like US Airways, as well as the distribution marketplace itself, will be subject to the mercy of those CRSs and the choices of the stronger, larger carriers.[7]

These anti-competitive, anti-consumer results are not merely conjecture. Delta effectively announced its plans to reduce or eliminate its participation in other CRSs, if permitted

to do so, under the guise of exploiting its "negotiating power." Comments of Delta Air Lines (Docket OST-97-2881) at 22-23 (Dec. 9, 1997). The Department of Justice recognized this result as well.

> However, airlines that are associated with a CRS through an ownership interest, an affiliate's ownership interest, or a marketing arrangement will have a different calculus. If given the chance, such airlines are likely to choose their CRS participation level based at least in part on the impact their selection will have on the profits of the CRS with which they are associated, rather than solely on the intrinsic value of the CRS service to their airline operations.
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> The result is that owner-airlines and airline marketers would likely lower their level of participation in other CRSs at a competitive disadvantage . . . . *Without that airline's participation, the CRS would have great difficulty convincing travel agents to subscribe to the system.*

Comments of Department of Justice (Docket OST-96-1145) at 10 (Sept. 19 ,1996)(emphasis added). Other comments, as acknowledged by the Department, have also "cite[d] cases where an airline that owns or markets a system allegedly has unreasonably limited its participation in competing systems in order to encourage travel agencies to choose its affiliated system, *notwithstanding the rule.*" 67 Fed. Reg. at 69393 (emphasis added). And, as noted above, the Department's previous findings and experience have confirmed as much. Clearly, this anti-consumer, anti-competitive fallout would, in fact, become a reality if the mandatory participation rule and the prohibition on discriminatory booking fees were to be eliminated.

As a half-measure that effectively concedes this concern is very real, the Department discusses an alternative proposal whereby airlines would be prohibited from declining to participate in competing systems with an intent to distort CRS competition. 67 Fed. Reg. at

[7] Of course, if Delta or other stronger, larger carriers had ownership interests in a particular CRS, then this parade of horrors is even more compelling.

69394. This alternative is fatally flawed in three critical respects, however, and thus should be rejected as a viable substitute for the mandatory participation rule.

First, it requires an evaluation and determination of a carrier's intent in deciding not to participate in another CRS. A determination of "intent" would be a difficult and complex burden for the Department if it ever sought to pursue any action against a carrier for distorting CRS competition. *Second*, any enforcement action under this alternative proposal would require a lengthy DOT investigation and proceeding about a carrier's decision to decline participation in a particular CRS. In the meantime, consumers, travel agents, and other airlines would be greatly disadvantaged as the larger, stronger carrier continued its conduct during the pendency of the investigation. *Third*, the Department's alternative presupposes that carriers following "normal" business practices would choose to make their services available through as many distribution channels as possible. This generalization may be convenient for the Department, but it lacks any solid underlying foundation. To the contrary, Southwest Airlines is proud of the fact that it limits the number of distribution outlets through which its services may be purchased; Delta's 1997 comments reveal its desire to limit distribution channels it uses (assuming the mandatory participation rule is eliminated); and the Justice Department has likewise acknowledged the incentive for carriers with market power to refrain from offering services as widely as possible. Simply put, this proposed alternative is fundamentally flawed. As explained above, it is a red herring with none of the benefits that have resulted from the two rules.

Moreover, the Department's premise for eliminating the prohibition against discriminatory booking fees – so that carriers may freely negotiate with CRSs on better terms – is illusory. It will only allow stronger carriers to dictate the terms of their contracts in return for their large volume of bookings. Other carriers without such large volume will have no such

leverage whatsoever. Instead, once the CRSs provide volume discounts to the larger carriers, they will then seek to recover these discounts and impose higher booking fees against the remaining carriers like US Airways.

The mandatory participation rule and the prohibition on discriminatory booking fees have generally protected consumers, travel agents, and many carriers against the 'monopoly' actions of larger, stronger carriers with marketing, ownership, or other favorable interests in a particular CRS. The underlying bases for the rule have not changed, nor has the Department shown any compelling evidence or provided a reasoned analysis (as it must) for its proposed elimination of these rules. *See, e.g., CSPI*, 797 F.2d at 999 (reasoned analysis required for rule elimination or change). Accordingly, the Department should retain the mandatory participation rule and the prohibition on discriminatory booking fees.

B. The Mandatory Participation Rule Should Apply To Carriers That Market Particular CRSs As Well.

The Department is correct to consider that the mandatory participation rule should be expanded to encompass carriers who substantially market particular systems (as the Department suggested, *e.g.*, Southwest, American),[8] even without any ownership interests therein – as some CRSs and carriers (*e.g.*, America West, Continental) have apparently proposed. Carriers that extensively market particular CRSs have the same incentives as carrier-owners in distorting the marketplace by limiting their participation and seeking to exploit their CRSs' market power to move travel agents and, consequently, other less powerful carriers to their particular CRSs. (*See* discussion in Part V(A).) This extension of the rule is particularly warranted now that the airline-owners of Worldspan are apparently selling their respective ownership interests. The

[8] *See* 67 Fed. Reg. at 69393.

Department itself noted: "Airlines with only a marketing relationship with a system have similarly made it more difficult for travel agents using another system to obtain complete information and make bookings, thus encouraging the agencies to choose the system marketed by the airline." 67 Fed. Reg. at 69383 (citing Amadeus experience). Accordingly, the Department is correct to conclude that the mandatory participation rule (if retained, as US Airways and others urge) should be extended beyond just owner-carriers to carriers that market particular systems. 67 Fed. Reg. at 69395.

C. The Proposed Sale of Carrier-Interests in Worldspan Does Not Change the Need for a Mandatory Participation Rule

The Department should not take comfort from the proposed sale of Worldspan by its carrier-owners. Absent the promulgation of a rule prohibiting CRS ownership by carriers, as US Airways has advocated, nothing precludes the stronger, larger carriers from investing in any particular CRS in the future. With that in mind, the sound rationale that supported the initial implementation of the mandatory participation rule remains valid, even if, at this instant, it appears that no U.S. carrier will have CRS ownership in the foreseeable future. Indeed, the elimination of the mandatory participation rule may give larger, stronger carriers an incentive to pursue CRS ownership, since under the Department's proposal, such carriers would not need to participate in other CRSs – a perverse outcome that would only disadvantage consumers.

D. Airlines Should Not Be Permitted to Own CRSs or OTAs Other Than Each Carrier's Own Website.

When the Department began this rulemaking several years ago, many carriers (including US Airways) had ownership interests in CRSs. In that environment, market forces were free to discipline the carrier-owners regarding their practices. Now, however, the ownership landscape

for CRSs and OTAs has changed dramatically, with only a few of the largest global, network carriers having such ownership interests and CRSs having ownership interests in OTAs. Consequently, that competitive market discipline no longer exists. And, if the sale of Worldspan by its airline-owners is completed, then this prohibition would not immediately affect any U.S. carrier, except with respect to the market power of the OTAs.

The larger stronger carriers with ownership or marketing interests in a particular CRS or OTA can greatly influence – if not, direct – the actions of the particular CRS or OTA with respect to other airlines, most of which no longer have a counter-balancing, and disciplining, ownership interest in another CRS or OTA. Thus, carriers like US Airways with no CRS ownership or marketing interests are, in many respects, at the mercy of the carriers with such interests in CRSs or OTAs and those CRSs and OTAs when it comes to the distribution of fares and service offerings through those channels. Indeed, US Airways' experience recently has been that it is much easier to negotiate and deal with independent (non-carrier-owned) CRSs or OTAs than ones owned by other airlines.

To remedy this imbalance in power among the carriers and their dealings with certain CRSs and OTAs, the Department should promulgate a rule precluding airline ownership of CRSs or OTAs. In this way, non-owner airlines would be negotiating and dealing with independent, more neutral distribution outlets, rather than ones greatly influenced, if not controlled, by larger, stronger carriers. Similarly, travel agents and consumers would be able to use the distribution outlets of their choice, without potential retribution by airline-owners displeased by the agent's or consumer's choice of a system other than the one owned by the airline.

That said, US Airways recognizes that airline-owned OTAs or websites, specific to a particular carrier, provide extensive benefits to consumers and carriers alike. To ensure that the

benefits of these particular distribution outlets remain available to consumers and carriers, the Department should provide a carve-out from this proposed ownership prohibition such that airlines could own and operate their own, individual websites. This carve-out should not, however, apply to websites or OTAs owned by multiple carriers.

VI. THE DEPARTMENT SHOULD RETAIN A SUNSET PROVISION FOR THE CRS REGULATIONS AS THE CRS INDUSTRY CONTINUES TO CHANGE RAPIDLY.

US Airways believes that it is critical for the Department to maintain significant attention to the CRS rules as they are complex and the landscape of the CRS industry continues to change rapidly. Therefore, US Airways submits that the CRS Regulations include a sunset provision which requires an overall reexamination of the rules in five years from the date on which these rules are finalized. In addition, based on the lengthy experience of this rulemaking which began in 1997, US Airways requests that the Department be prepared to respond quickly to the rapidly-changing circumstances in the industry so that it may implement specific rules or rule changes without delay during the interim period.

March 17, 2003

Respectfully submitted,

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Washington, D.C. 20004-1109
(202) 383-5300

Exhibit 1

SEA – LAX 03/25/03

Page 1

125MARSEALAX‡*US«
25MAR TUE SEA/PST LAX/PST‡0¶
1AS 288 F5 U A0 Y7 S7 B7 M7 H7 SEALAX 8 700A 927A 739 B 0¶
Q7 L7 V7 K7 G7 T7 W7¶
2QF*3726 F9 A9 J9 D9 Y9 B9 H9 K9 SEALAX 700A 927A 739 B 0¶
M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
3HA*4288 F7 J7 P7 Y7 X7 W7 Q7 M7 SEALAX 700A 927A 734 B 0¶
H7 K7¶
ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
4NW*4288 F4 P4 Y4 B4 M4 H4 Q4 V4 SEALAX 700A 927A 739 B 0¶
K0¶
OPERATED BY ALASKA AIRLINES¶
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Q7 L7 V7 K7 G7 T7 W7¶
6QF*3730 F9 A9 J9 D9 Y9 B9 H9 K9 SEALAX 728A 955A 739 0¶
M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶

Page 2

25MAR TUE SEA/PST LAX/PST‡0¶
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ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
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Q0 V0 K0¶
OPERATED BY ALASKA AIRLINES¶
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INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
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INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY UNITED AIRLINES¶

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6RG*7027 F7 A7 Y7 B7 M7 H7 SEALAX 710A 949A 735 S 0¶
Q7 L0 V0¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY UNITED AIRLINES¶

Page 3

25MAR TUE SEA/PST LAX/PST‡0¶
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Q7 L7 V7 K7 G7 T7 W7¶
2QF*3734 F9 A9 J9 D9 Y9 B9 H9 K9 SEALAX 808A 1043A M80 B 0¶
M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
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H7 K7¶
ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
4NW*4588 F4 P4 Y4 B4 M4 H4 Q4 V4 SEALAX 808A 1043A M80 B 0¶
K4¶
OPERATED BY ALASKA AIRLINES¶
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Q7 L7 V7 K7 G7 T7 W7¶
6QF*3736 F9 A9 J9 D9 Y9 B9 H9 K9 SEALAX 858A 1133A M80 S 0¶
M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶

Page 4

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M7 H7 K7¶
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OPERATED BY ALASKA AIRLINES¶
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V4 K0¶
OPERATED BY ALASKA AIRLINES¶
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H7 Q7 L7 V7 K7 G7 T7 W7¶
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K9 M9 L9 S9¶
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OPERATED BY ALASKA AIRLINES¶
5HA*4292 F7 J7 P7 Y7 X7 W7 Q7 SEALAX 927A 1202P 734 S/ 0¶

M7 H7 K7¶
ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
6NW*4292 F4 P4 Y4 B4 M4 H4 Q4 SEALAX 927A 1202P M80 S/S/ 0¶
V4 K4¶
OPERATED BY ALASKA AIRLINES¶

Page 5

25MAR TUE SEA/PST LAX/PST‡0¶
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M7 H7 Q7 L7 V7 K7 G7 T7 W7¶
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H9 K9 M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
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Q7 M7 H7 K7¶
ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶
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Q4 V4 K4¶
OPERATED BY ALASKA AIRLINES¶
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H9 K9 M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶

Page 6

25MAR TUE SEA/PST LAX/PST‡0¶
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Q4 V4 K4¶
OPERATED BY ALASKA AIRLINES¶
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V7 W7 A2¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY UNITED AIRLINES¶
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V9 W9 T9 S9 K9 L9 G0 A6¶
5AS 84 F7 U A7 Y7 S7 B7 SEALAX 8 1200N 236P 739 L/R 0¶

M7 H7 Q7 L7 V7 K7 G7 T7 W7¶
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H9 K9 M9 L9 S9¶
INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶

Page 7

25MAR TUE SEA/PST LAX/PST‡0¶
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OPERATED BY ALASKA AIRLINES¶
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V0 K0¶
OPERATED BY ALASKA AIRLINES¶
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INTL ONLINE CONEX/STPVR TFC ONLY¶
OPERATED BY ALASKA AIRLINES¶

Page 8

25MAR TUE SEA/PST LAX/PST‡0¶
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Q0 V0 K0¶
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OPERATED BY ALASKA AIRLINES¶

Page 9

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Q4 V0 K0¶
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H9 K9 M9 L9 S9¶
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ONLINE CONEX/STPVR TFC ONLY¶
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V K ¶

Page 10

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Q7 M7 H7 K7¶
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4WN 1443 Y L B Q H M V K SEALAX 5 535P 915P 733 1¶
5WN 322 Y L B Q H M V K SEALAX 6 705P 1040P 733 1 XJ¶

Page 12

25MAR TUE SEA/PST LAX/PST‡0¶
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K4 V4 M0¶
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5NW*4642 F4 P4 Y4 B4 M4 H4 Q4 SEALAS 600A 824A 739 S 0 XJ¶
V0 K0¶
OPERATED BY ALASKA AIRLINES¶
6NW*4830 F4 P4 Y4 B4 M4 H4 Q4 LAX 950A 1106A 733 0¶
V0 K0¶
OPERATED BY AMERICA WEST AIRLINES¶

Page 13

25MAR TUE SEA/PST LAX/PST‡0¶
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Q9 V9 W9 T9 S9 K9 L9 G0 A5¶
3UA 422 F9 Y9 B9 M9 H9 SEADEN 9 600A 932A 320 B/ 0 DCA /E¶
Q9 V9 W9 T9 S9 K9 L9 G9 A9¶
4UA 781 F5 Y9 B9 M9 H9 LAX 9 1025A 1150A 320 S/ 0 XJ DCA /E¶
Q9 V9 W9 T9 S9 K9 L9 G0 A5¶
5AS 460 F5 U A0 Y7 S7 SEASNA 7 610A 851A 73G B 0 XJS¶
B7 M7 H7 Q7 L7 V7 K7 G7 T7 W7¶
6UA*6256 Y9 B9 M9 H9 Q8 LAX 933A 1005A EM2 0 DCA /E¶

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OPERATED BY UNITED EXP/SKY WEST AIRLINES¶

Page 14

25MAR TUE SEA/PST LAX/PST‡0¶
1DL 572 F4 A4 Y4 B4 M4 H4 Q4 SEASLC 9 615A 910A 757 0¶
K4 L4 U T4¶
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K4 L4 U T4¶
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OPERATED BY HORIZON AIR¶
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H7 Q7 L7 V7 K6 G0 T0 W0¶
5CO*8441 Y7 H7 K7 B7 V7 Q7 T7 SEAEUG 640A 748A DH8 0¶
OPERATED BY HORIZON AIR DBA ALASKA AIRLINES¶
6CO*8373 Y7 H0 K0 B0 V0 Q0 T0 LAX 1150A 146P CRJ 0 XS¶
OPERATED BY HORIZON AIR DBA ALASKA AIRLINES¶

Page 15

25MAR TUE SEA/PST LAX/PST‡0¶
1F9 532 Y4 K4 B4 M4 H4 Q4 V4 SEADEN 630A 1000A 319 0 XJ¶
T4 L4 G4 S0¶
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T4 L0 G0 S0¶
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H7 Q7 L7 V7 K7 G7 T7 W7¶
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W7 M7 L7 S0¶
OPERATED BY AMERICAN EAGLE¶
5AS 344 F5 U A0 Y7 S7 B7 M7 SEAPSP N 625A 1029A M80 S 1¶
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6AA*3290 Y7 B7 H7 K7 M6 Q5 V4 LAX 9 1251P 138P SF3 0 /E¶
L0 W2 N0 S0¶
OPERATED BY AMERICAN EAGLE¶

Page 16

25MAR TUE SEA/PST LAX/PST‡0¶
1UA*6689 Y9 B9 M9 H9 Q9 SEAPDX 650A 735A EM2 0 XJS DCA /E¶
V9 W9 T9 S9 K9 L9 G9¶
OPERATED BY UNITED EXP/SKY WEST AIRLINES¶
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Q0 V0 W0 T0 S0 K0 L0 G0 A5¶
3AS 586 F4 U A0 Y7 S7 SEAPSP 8 700A 940A M80 B 0¶
B7 M7 H7 Q7 L7 V7 K7 G7 T7 W7¶

4UA*6136 Y9 B9 M9 H9 Q9 LAX 1003A 1050A EM2 0 DCA /E¶
V9 W9 T8 S9 K9 L9 G0¶
OPERATED BY UNITED EXP/SKY WEST AIRLINES¶
5AS 550 F7 U A4 Y7 S7 SEASAN 9 650A 929A M80 B 0 XJ¶
B7 M7 H7 Q7 L7 V7 K7 G7 T7 W7¶
6UA*6168 Y9 B9 M9 H9 Q9 LAX 1030A 1120A EM2 0 DCA /E¶
V9 W9 T9 S9 K9 L9 G9¶
OPERATED BY UNITED EXP/SKY WEST AIRLINES

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing Comments of US Airways, Inc. by first class U.S. mail, postage prepaid, on the following:

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